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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 402

HONORABLE PAUL LEAHY, Chief Judge of the United States District Court for the District of Delaware and NATIONAL CAN CORPORATION,

Petitioners,

—against—

THE CANISTER COMPANY and THE CANISTER COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ARTHUR C. GILLETTE,
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JAMES HARTE LEVENSON,
JOHN J. MORRIS, JR.,
Of Counsel.

November 17, 1951.

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Opinions Below

The opinion of the Court of Appeals appears in 191 F. 2d 255 (advance sheets) and is printed in R. 135-138. The opinion of Judge Leahy appears at R. 43-52, and is not reported.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

Questions Presented

1. Whether plaintiffs, who commence civil actions in a United States District Court, upon a single cause of action, seeking equitable relief for specific performance of a breached contract, and for an accounting for damages, and who thereafter amend their complaints by leave of Court, so as to waive all equitable relief, and confine themselves solely to money damages for breach of the contract, have the right to demand trial by jury contemporaneously with the amendment to the complaints.

2. Whether a denial by the District Court of right to trial by jury in such a case presents a proper cause to a Court of Appeals for the exercise of its discretion to issue a writ of mandamus.

Constitutional Provision and Rule Involved

The Seventh Amendment to the Constitution, which reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 38, to the extent material, reads:

"RULE 38. JURY TRIAL OF RIGHT.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) DEMAND. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

Statement

The litigation involves two civil actions commenced by respondents, as plaintiffs, in the United States District Court for the District of Delaware. As these two actions for present purposes are in all respects similar, and have been consolidated, we shall treat them as one.

The original complaint alleged that plaintiff was a manufacturer of fibre-bodied metal-end containers, and that defendant contracted to fabricate and supply metal ends for such containers; that defendant breached that contract; that such articles to be supplied by defendant could not be procured elsewhere; that defendant knew of the great demand made upon plaintiff by its customers; and that plaintiff could not perform its contracts because of such breach by defendant; and that such breach was causing plaintiff irreparable harm (R. 8-13).

The complaint concluded with prayers that defendant be required to perform its contracts, and to account and

pay to plaintiff $10,000,000, or such other sum as may be found due (R. 13). The complaint concluded with an omnibus prayer for such other relief as the case may require (R. 13).

Defendant answered (R. 84-90).

Judge Leahy thereafter upon defendant's motion under Rule 42(b), F. R. C. P., ordered that the issues of the making of the contract sued upon and whether it was barred by the applicable statute of frauds should be tried in advance of the other issues (*Canister Co.* v. *National Can Corp.*, 3 F.R.D. 279 [D. C. Del. 1943]).

That issue was determined favorably to respondents, although by a series of subsequent amendments the scope of that determination was materially cut down. (*Canister Co.* v. *National Can Corp.*, 63 F. Supp. 361 [D. C. Del. 1945]; *Canister Co.* v. *National Can Corp.*, 64 F. Supp. 808 [D. C. Del. 1946]).

There was an abortive appeal to the Court of Appeals, which dismissed the appeal upon the ground that a judgment as to some of the issues was not appealable (*Canister Co.* v. *National Can Corp.*, 163 F. 2d 683 [3d Cir. 1947]).

There were then two preliminary efforts by Canister to secure trial by jury. Neither one forms the basis of the present proceeding, but we recite them solely as part of the history of the case.

In 1948 respondents moved for a jury trial in the discretion of the Court because equitable relief in the meantime had become moot. Judge Leahy denied that motion, saying that he and counsel had regarded the action as being "at law", and that hence a jury could have been demanded at the inception of the action (*Canister Co.* v. *National Can Corp.*, 8 F. R. D. 408, 409 [D. C. Del. 1948]).

Subsequently, Canister filed a formal document waiving equitable relief and demanding trial by jury (R. 23). Judge Leahy denied that motion (R. 24-26, no opinion for publication). Thereupon, Canister sought a writ of mandamus to compel Judge Leahy to place the case on the jury list. That petition was denied because although the Court of Appeals agreed with Canister that the complaints sought equitable relief, it asserted that in the absence of a formal amendment of the complaint the actions were still equitable in nature and that no jury trial could be had at that stage. (*Canister Co.* v. *Leahy,* 182 F. 2d 510 [3d Cir. 1950].)

This was the first time that respondents were able to obtain an expression of an appellate court that the complaint was of an equitable nature, contrary to Judge Leahy's misconceptions.

Thereupon respondents moved in the District Court for leave to amend the complaints so as to drop the prayers for equitable relief and substitute a prayer for money damages. That motion was granted (R. 27). Amended complaints and jury demands were served and filed simultaneously on October 3, 1950 (R. 28-42).

Thereupon National Can moved to strike out the jury demands. Judge Leahy granted that motion (R. 43-54).

Although the Court of Appeals had decided that the nature of the actions should be determined from the complaints (*Canister Co.* v. *Leahy,* 182 F. 2d 510 [3d Cir. 1950]), Judge Leahy reverted to his earlier conception that the complaints were at "law", and that Canister was too late in demanding a jury (R. 43-52).

Respondents then again sought a writ of mandamus from the Third Circuit. That writ was granted because now respondents came within Rule 38(b), F.R.C.P. (R. 135-138, 191 F. 2d 255, adv. sh.).

It is this last determination which petitioners seek to review.

Argument

Notwithstanding the efforts of petitioners in straining to create a problem, the questions presented are very narrow, present no conflict among the several circuits, and the determination by the Court of Appeals is correct.

The petition presents no question that was not presented in *Bereslavsky* v. *Caffey*, 161 F. 2d 499 (2d Cir. 1947) and *Bereslavsky* v. *Kloeb*, 162 F. 2d 862 (6th Cir. 1947), in both of which cases this Court denied the applications for writs of certiorari (*Caffey* v. *Bereslavsky*, 332 U. S. 770 (1947) and *Kloeb* v. *Bereslavsky*, 332 U. S. 816 (1947).

Moreover, if any other issues are raised, they are *sui generis* to this litigation, and do not warrant consideration by this Court.

I

No right to a jury trial existed when the civil actions were commenced.

When the Federal Rules of Civil Procedure were adopted, for most purposes it became unimportant to determine whether an action was one formerly denominated as "legal" or "equitable." However, when questions with regard to jury trial arise, it becomes necessary to so categorize the action. Indeed, the enabling legislation, formerly 28 U. S. C. §723c; June 19, 1934, c. 651, §2; 48 Stat. 1064, now 28 U. S. C. §2072, expressly recognized that, and prohibits any interference with the right to trial by jury guaranteed by the Seventh Amendment. Rule 38 (a) imple-

ments that guaranty, and Rule 38 (b) provides that such demand shall be made not later than 10 days after "the service of the last pleading directed to such issue."

Almost immediately the question arose as to the rights of the parties where the action embraced two or more claims, one of which was formerly cognizable in law and the other in equity.

Thus, where a claim arose out of a single occurrence, event or transaction, and plaintiff prayed for equitable relief and also sought money damages for the same wrong, no right to trial by jury existed, because prior to the merged practise equitable courts could render money judgments in cases where equitable jurisdiction had attached. (*Bellevance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 [D. C. Mass., 1939]; *Williams* v. *Collier*, 32 F. Supp. 321 [E. D. Pa., 1940]; *Fraser* v. *Geist*, 1 F. R. D. 267 [E. D. Pa., 1940].)

This Court held to like effect prior to the adoption of the Rules (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 48 [1936]).

Bruckman v. *Hollzer*, 152 F. 2d 730 (9th Cir., 1946) shows the other side of the coin. There three separate and distinct claims, arising out of three separate transactions, were pleaded in a single civil action. The first was a pure claim for a money judgment. The other two claims were for equitable relief. Plaintiff demanded a jury trial on the first issue only. Defendant moved to strike that demand upon the ground that combining separate causes of action in one complaint barred a jury trial as to all claims. That motion was denied and defendant sought mandamus. The Ninth Circuit pointed out the distinction between complaints founded on one occurrence, event or transaction, and those founded on independent claims, saying at 152 F. 2d 731:

> "However, no one of the three transactions alleged needs for its adjudication the prior decision of either of the others, hence the instant case is unlike Fitzpatrick v. Sun Life Assur. Co., D. C., 1 F. R. D. 713, 717, and Pallant v. Sinatra, D. C., 59 F. Supp. 684, 685, where the opinion states that there can be no recovery on the common law claim unless recovery be had in the equitable issues."

The right to a jury trial on the separate claims was preserved.

The original complaints at bar, sought equitable relief and an accounting for damages arising out of a single contract and its breach (R. 8-22).

The Court of Appeals in the first mandamus proceeding so held, notwithstanding the district judge always "regarded" the action as being one only for money damages (*Canister Co.* v. *Leahy,* 182 F. 2d, 510 [3d Cir., 1950]).

Thus it is clear that upon the inception of the actions no right to trial by jury existed.

Moreover, we do not conceive that the Court should attempt to review the nature of the original complaints. That does not present any important question of general law.

II

Upon the amendment of the complaints, the right to demand jury trial arose.

The District Court gave leave to respondents to amend their complaints after the Court of Appeals in the first mandamus proceeding, had sustained respondents' claim that the complaints were solely equitable (R. 26-27). Respondents availed themselves of that right and served amended complaints converting the actions into legal actions (R. 28-41). Simultaneously, they served and filed jury demand (R. 42).

Thus the sole issue is whether the right to demand trial by jury is created by amending the complaints, converting them from equitable complaints to legal complaints, and whether the time within which to make such demands is measured by such amended pleadings.

That question has been answered in the affirmative in the two *Bereslavsky* cases, in both of which this Court denied the petition for a writ of certiorari (*Bereslavsky* v. *Caffey,* 161 F. 2d 499 [2d Cir., 1947], cert. den. 332 U. S. 770 [1947]; *Bereslavsky* v. *Kloeb,* 162 F. 2d 862 [6th Cir., 1947], cert. den. 332 U. S. 816 [1947]).

In the case at bar the Third Circuit has followed the Second and Sixth Circuits. No circuit has held otherwise. Significantly, petitioners have ignored the two *Bereslavsky* cases, and have sought to create a conflict by reference to cases which in fact are in harmony with our views.

We have heretofore discussed *Bruckman* v. *Hollzer,* 152 F. 2d 730, decided by the Ninth Circuit, which merely held that where two or more separate claims are joined in one

action, the right to jury trial must be determined separately for each count.

Keene v. *Hale-Halsell Co.*, 118 F. 2d 332 (5th Cir., 1940) is of like tenor. There a simple contract creditor, who had not reduced his claim to judgment, commenced a creditor's suit to avoid certain deeds claimed to be in fraud of creditors. After trial, no one having demanded a jury, the defendants asserted that the action could not be maintained because defendants were entitled to a jury trial on the law issue of the existence and amount of plaintiff's claim. The Court followed the same reasoning as in the *Bruckman* case, saying that a separate jury trial could be had on that issue.[1]

The distinction is not the artificial one posed by petitioners at page 20 of the petition, as to whether two issues are pleaded as separate counts or as one. The real distinction is whether in fact a plaintiff sues upon a single wrong, or upon two or more independent wrongs.

Canister presented a single issue and not two by its original pleadings: the existence and breach of a single contract, and the relief to which it was entitled.

The decision by the Court of Appeals is correct as the right to a jury trial arose when the complaints were amended, and the demand was made concurrently with the service and filing thereof—well within ten days of the service of the last pleading directed to the issue to be tried.

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[1] We shall discuss the *Keene* case further in connection with petitioners' new contention that the right to jury trial is governed by state law.

III

The right to jury trial is not governed by State law.

As the footnote at page 22 of the petition discloses, petitioners never heretofore claimed, nor did any Court consider, whether the right to demand a jury was governed by state law.

Under those circumstances, this Court has the right to, and should, ignore that point. (*Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418 [1933].) That is equally so where the point is first raised in the petition for the writ of certiorari. (*Helvering* v. *Wood,* 309 U. S. 344, 348 [1940].)

Moreover, this Court, if possible, should avoid being a court of first instance in construing local law (*Helvering* v. *Stuart,* 317 U. S. 154, 164 [1942]).

However, the right to trial by jury in a federal court is exclusively a federal question and has always been so recognized.

The Seventh Amendment expressly preserves the right to jury trial in common law actions. It is hard to visualize a common law action in a federal district court, other than one involving diversity of citizenship, in view of the limited class of cases over which federal courts have jurisdiction.

This Court took great pains to say in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78 (1938) "There is no federal general common law."

If we were to follow petitioner's belated view we would reach the startling conclusion that the Seventh Amendment is almost without significance.

All that the *Erie Railroad* case decided was that the Rules of Decision Act (now Judicial Code, §1652) embraces state judicial determinations as well as statutory enactments. We have no quarrel with that doctrine.

However, the jurisdiction of federal courts and the mode of trial flow from the constitution, federal statutes and rules. The right to jury trial, or absence thereof, is neither enlarged nor diminished by any question of state court practice.

Scott v. *Neeley,* 140 U. S. 106 (1891) was a case in which a simple contract creditor, who had not reduced his claim to judgment, commenced a creditor's bill in a federal court, at a time when the federal courts had separate law and equity sides. The law of the state in which the Court sat permitted such an action. Nevertheless, the bill was dismissed because it would deprive defendants of the right to test plaintiff's claim to be a creditor, and the amount of the claim, before a jury. The state statute could not confer jurisdiction upon a federal court, nor deprive a party of a jury which is preserved in common law actions.

The same problem arose in *Keene* v. *Hale-Halsell Co.,* 118 F. 2d 332 (5th Cir., 1940), after the adoption of the merged practice. Although the application of the rule varied, the underlying principle remained immutable. Under the new practice one suit was sufficient, but the common law issue could be tried to a jury.

Significantly, the Court saw no reason for applying state law in either instance, for state law can neither coalesce or divide the practice in federal courts.

The problem has also arisen in other settings. Thus where state statutes provide that certain issues cannot be withdrawn from the jury's consideration, such statutes are

not binding upon federal courts in diversity cases (*Herron* v. *Southern Pacific Co.*, 283 U. S. 91 [1931]).

Beagle v. *Northern Pacific Ry.*, 32 F. Supp. 17 (W. D. Wash. 1940), was decided by a district court in the Ninth Circuit, six years prior to *Bruckman* v. *Hollzer*, 152 F. 2d 730 (9th Cir., 1946). If the former decides anything at variance with the latter, it has been overruled. However, in fact nothing contrary to our views was then decided. That was a jury case. Defendant wanted one issue tried separately by the Court. Since counsel did not cite any applicable law, the Court decided to follow state practice. We do cite federal law.

Moreover, the case is significant for another reason. In what the Court considered an open question, it followed a course which resulted in a jury trial. Significantly, while there is a constitutional guaranty of a jury trial in common law actions, there is no provision guaranteeing a non-jury trial in any case. Manifestly in any doubtful case, the question should be resolved in favor of jury trial.

In *Ross* v. *Service Lines, Inc.*, 31 F. Supp. 871 (D. C. Ill., 1940), the Court had theretofore decided to have a separate trial of one of the issues. He now decided that the separate issue should be tried to the Court. That determination was based solely upon the fact that the existence or non-existence of a remedy involved a substantive question of state law. Here, we are faced only with the question whether the complaints originally pleaded a cause in equity and now at common law. Answering those questions in the affirmative, the right to jury trial emerges.

To adopt petitioners' views would be a distinct step backward. In substance, it would mean that in those few states that still adhere to a divided practice, the federal courts in violation of the Rules would have to conform

thereto. Even under the old conformity practice, states which had a merged procedure could not foist such jurisdiction upon federal courts; likewise, states with a divided practice cannot deprive federal courts of the advantages of a merged practice.

It is clear, if this point is considered by the Court, that the right to a jury trial is governed by federal law exclusively.

IV

The Court of Appeals was warranted in granting a writ of mandamus.

Little profit will result in quoting from opinions as to when courts are warranted in entertaining applications for writs of mandamus. In those cases in which the writ was deemed to be the proper remedy, as well as those in which it was felt that the writ should not issue, courts have used virtually identical language. We shall not rely upon abstract language as to what is or is not an extraordinary case. What is significant is that in every case where the issue was the right to a jury trial, mandamus was considered a proper remedy and the case was determined on the the merits.

Ex parte Simons, 247 U. S. 231 (1918) raised that point squarely. Petitioners urge that since the fusion of law and equity that case has lost the force of its reasoning. They seem to labor under the misapprehension that in 1918 United States District Courts did not have equitable jurisdiction, and that the result of the district judge's action was to repudiate jurisdiction of the action, resulting in a dismissal of the same. Nothing is further from the facts.

The action was transferred to the equity side of the court and docketed as an equity cause (247 U. S. 231, 238). Manifestly, the plaintiff in that case was not concerned with whether the papers were filed in a jacket that bore the label "equity", and entries were made in a docket bearing the same label. The litigant in the *Simons* case was concerned because the effect of the district court's order was to deprive her of a jury trial. The law judge and the chancellor in the federal judicial system have always been the same person. Jurisdiction in the *Simons* case would have been exercised, but before a judge without a jury. Transfer from law side to equity was merely the mechanics exercised to deny a jury trial. Today the comparable order is the one of Judge Leahy granting the motion to strike the jury demand and place the case on the non-jury list. The wrong is as great, and the remedy is the same.

Moreover, the remedy was resorted to and sustained in the *Bereslavsky* cases, *supra.*

City of Morgantown v. *Royal Insurance Co.,* 337 U. S. 254 (1949) decides nothing to the contrary. That involved an attempt to appeal and not a mandamus proceeding. All that this Court held was that an interlocutory order denying trial by jury does not constitute an injunction and hence is not appealable. This Court took great pains in the concluding paragraph of its opinion to show that it did not reach the merits. Moreover, that case concerned the question as to which issue should be tried first, the equity issue, without a jury, or the legal issue, with a jury. In the *Canister* cases, only one issue—damages—remains.

The Court of Appeals wisely exercised its power in granting the writ of mandamus, and the cause should not be further delayed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 17, 1951.

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